



6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 550 and 591

RIN: 3206-AM31

Change in Definitions; Evacuation Pay and the Separate Maintenance Allowance at Johnston Island

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is revising its regulations on evacuation pay and the separate maintenance allowance for duty at Johnston Island to ensure that same-sex domestic partners of Federal employees and the children of such domestic partners have access to these benefits to the same extent as spouses of Federal employees and their children. These changes fulfill the Administration policy expressed in the President's June 2, 2010, memorandum on the "Extension of Benefits to Same-Sex Domestic Partners of Federal Employees."

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kurt Springmann, by telephone at (202) 606-2858 or by email at pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing final regulations on evacuation pay at 5 CFR part 550, subpart D, and the separate maintenance allowance for duty at Johnston Island at 5 CFR part 591, subpart D. These regulations ensure that same-sex domestic partners of Federal

employees and the children of such domestic partners have the same access to these benefits as opposite-sex spouses of Federal employees and their children.

Background

On June 17, 2009, President Obama issued a memorandum regarding Federal benefits and non-discrimination that requested the Secretary of State and the Director of OPM, in consultation with the Department of Justice, to extend previously identified statutorily based benefits that those agencies believed could be extended to qualified same-sex domestic partners of Federal employees, consistent with underlying law. This memorandum also directed the heads of executive departments and agencies, in consultation with OPM, to conduct a review of the benefits offered by their respective departments and agencies to determine whether they had the authority to extend such benefits to the same-sex domestic partners of Federal employees. The memorandum further requested that OPM, in consultation with the Department of Justice, make recommendations regarding any additional measures that could be taken to provide benefits to the same-sex domestic partners of Federal Government employees, consistent with existing law.

On June 2, 2010, the President issued another memorandum, entitled “Extension of Benefits to Same-Sex Domestic Partners of Federal Employees,” that published the results of the review and identified the benefits that could be extended to same-sex domestic partners and their families. These regulations respond to two portions of the President’s memorandum, which identified additional benefits OPM had concluded it could offer and requested OPM to (1) “clarify that under appropriate circumstances, employees’ same-sex domestic partners and their children qualify as dependents for

purposes of evacuation payments made under 5 U.S.C. 5522-5523”; and (2) “clarify that employees’ same-sex domestic partners qualify as dependents for purposes of calculating the extra allowance payable under 5 U.S.C. 5942a to assist employees stationed on Johnston Island, subject to any limitations applicable to spouses.”

Also on June 2, 2010, OPM issued a Memorandum for the Heads of Executive Departments and Agencies, entitled “Implementation of the President’s Memorandum Regarding Extension of Benefits to Same-Sex Domestic Partners of Federal Employees” to help fulfill the Administration’s policy. The memorandum provides definitions to help ensure its consistent application across the Federal Government. To ensure consistent application of the definition of *domestic partnership* found in this memorandum, OPM wants to clarify paragraph (4) of the definition that states that domestic partners “share responsibility for a significant measure of each other’s financial obligations.” This provision provides only for the financial interdependence between partners and should not be interpreted to exclude partnerships in which one partner stays at home while the other is the primary financial breadwinner.

We are also clarifying paragraph (7) of the domestic partner definition that states that the domestic partners "Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed." The intent of this language is to prohibit recognition of domestic partnerships between individuals who are related in a manner that would preclude them from marrying were they of opposite sexes. We are maintaining this criterion, but clarifying that the determination is to be made at the time the domestic partnership is

formed. It should not be re-examined if the couple relocates to a different jurisdiction. This approach is consistent with treatment of opposite-sex marriages.

For the reasons outlined in the President's June 17, 2009, and June 2, 2010, memoranda, these regulations extend domestic partnership benefits only to same-sex couples, who are currently unable to obtain spousal benefits by entering a Federally-recognized marriage.

Executive Order 13563, *Improving Regulation and Regulatory Review*, sets out a series of requirements that must be followed, to the extent permitted by law, in issuing regulations. That Executive Order states that "[w]here appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." Such values are relevant here. In particular, this regulation would protect human dignity, and promote equity and fairness by ensuring equal access to these benefits for LGBT Federal employees.

OPM published proposed regulations for public comment on July 28, 2011, at 76 FR 45205. The 60-day comment period for the proposed regulations ended on September 26, 2011. We received no comments in response the proposed regulations. As a result, we are adopting the proposed regulations as final.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects

5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

5 CFR Part 591

Government employees, Travel and transportation expenses, Wages

U.S. Office of Personnel Management.

John Berry,
Director.

Accordingly, OPM is amending 5 CFR parts 550 and 591 as follows:

PART 550 – PAY ADMINISTRATION (GENERAL)

Subpart D—Payments and Flexibilities During an Evacuation

1. The authority citation for subpart D of part 550 continues to read as follows:

Authority: 5 U.S.C. 5527; E.O. 10982, 3 CFR 1959-1963, p.502.

2. In § 550.402, the definition of “dependent” is revised and the definitions of “domestic partner”, “domestic partnership”, and “family member” are added to read as follows:

§ 550.402 Definitions.

* * * * *

Dependent means a family member of the employee residing with the employee and dependent on the employee for support.

* * * * *

Domestic partner means a person in a domestic partnership with an employee or annuitant of the same sex.

Domestic partnership means a committed relationship between two adults of the same sex in which the partners—

- (1) Are each other's sole domestic partner and intend to remain so indefinitely;
- (2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);
- (3) Are at least 18 years of age and mentally competent to consent to contract;
- (4) Share responsibility for a significant measure of each other's financial obligations;
- (5) Are not married or joined in a civil union to anyone else;
- (6) Are not the domestic partner of anyone else;
- (7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;
- (8) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation

under 18 U.S.C. 1001, and that the method for securing such certification, if required, will be determined by the agency; and

(9) Are willing promptly to disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.

* * * * *

Family member means an individual with any of the following relationships to the employee:

- (1) Spouse, and parents thereof;
- (2) Sons and daughters, and spouses thereof;
- (3) Parents, and spouses thereof;
- (4) Brothers and sisters, and spouses thereof;
- (5) Grandparents and grandchildren, and spouses thereof;
- (6) Domestic partner, and children and parents thereof, including a domestic

partner of any individual in paragraphs (2)-(5) of this definition; and

(7) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

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PART 591—ALLOWANCES AND DIFFERENTIALS

Subpart D - Separate Maintenance Allowance for Duty at Johnston Island

3. The authority citation for subpart D of part 591 continues to read as follows:

Authority: 5 U.S.C. 5942a(b); E.O. 12822, 3 CFR, 1992 Comp., p. 325.

4. In § 591.402, the definitions of “domestic partner” and “domestic partnership” are added, and the definition of “family member” is revised to read as follows:

§ 591.402 Definitions.

* * * * *

Domestic partner means a person in a domestic partnership with an employee or annuitant of the same sex.

Domestic partnership means a committed relationship between two adults of the same sex in which the partners—

- (1) Are each other's sole domestic partner and intend to remain so indefinitely;
- (2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);
- (3) Are at least 18 years of age and mentally competent to consent to contract;
- (4) Share responsibility for a significant measure of each other's financial obligations;
- (5) Are not married or joined in a civil union to anyone else;
- (6) Are not the domestic partner of anyone else;
- (7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;
- (8) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, will be determined by the agency; and

(9) Are willing promptly to disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.

Family member means one or more of the following relatives of an employee who would normally reside with the employee except for circumstances warranting the granting of a separate maintenance allowance, but who does not receive from the Government an allowance similar to that granted to the employee and who is not deemed to be a family member of another employee for the purpose of determining the amount of a separate maintenance allowance or similar allowance:

(1) Children who are unmarried and under 21 years of age or who, regardless of age, are incapable of self-support, including natural children, step and adopted children, and those under legal guardianship or custody of the employee, or of the employee's spouse or domestic partner, when they are expected to be under such legal guardianship or custody at least until they reach 21 years of age and when dependent upon and normally residing with the guardian;

(2) Parents (including step and legally adoptive parents) of the employee, or of the employee's spouse or domestic partner, when such parents are at least 51 percent dependent on the employee for support;

(3) Sisters and brothers (including step or adoptive sisters and brothers) of the employee, or of the employee's spouse or domestic partner, when such sisters and brothers are at least 51 percent dependent on the employee for support, unmarried and under 21 years of age, or regardless of age, are incapable of self-support;

(4) Spouse, excluding a spouse independently entitled to and receiving a similar allowance; or

(5) Domestic partner, excluding a domestic partner independently entitled to and receiving a similar allowance.

* * * * *

4. In § 591.403, revise paragraph (a) to read as follows:

§ 591.403 Amount of payment.

(a) The annual rate of the separate maintenance allowance paid to an employee is determined by the number of individuals, including a spouse, a domestic partner, and/or one or more other family members, who are maintained at a location other than Johnston Island.

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